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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TOM ROLFS, Superintendent,

Petitioner,

v.

LOUIS EUGENE RUSSELL,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Louis Eugene Russell, through counsel, moves pursuant to Supreme Court Rule 39 for leave to proceed in forma pauperis. The undersigned counsel was appointed by the United States Court of Appeals for the Ninth Circuit under the Criminal Justice Act. Mr. Russell was granted leave to proceed in forma pauperis by the United States District Court on June 24, 1988.

DATED: March 29, 1991.

Respectfully submitted,

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Russell

NO. 90-1370

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TOM ROLFS, Superintendent,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Louis Eugene Russell respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 893 F.2d 1033 (9th Cir. 1990).

OPINIONS BELOW

The Petitioner does not list, or reference anywhere in its Petition, the Washington Supreme Court's Order Denying Motion To Modify Commissioner's Ruling. That order appears as Appendix A hereto. The Commissioner's Ruling to which it refers is Appendix E to the Petition.

JURISDICTION

Respondent agrees with Petitioner's jurisdictional

statement.

STATEMENT OF THE CASE

The Petitioner has omitted several facts of significance, and so the case is restated fully here.

Respondent Louis Eugene Russell was originally charged in 1980 in Washington State court with first degree murder, rape in the first degree, and attempted murder in the first degree. The charges stemmed from a strange series of events which began when Mr. Russell, a career soldier with a spotless record who was stationed at Fort Lewis, Washington, was invited by a stranger, Kenneth Hanks, to come to the Hanks apartment. The events ended with Kenneth Hanks dead and his wife, Sherry, having been stabbed and, she testified, raped. Mr. Russell admitted being in the house, but testified that after he had consensual sex with Sherry Hanks at Kenneth Hanks' urging, Kenneth Hanks became enraged, stabbed Sherry Hanks, and attacked Mr. Russell, who wrestled the knife away and stabbed Hanks in self defense. State v. Russell, 33 Wn. App. 579, 657 P.2d 338, 341 (1983), reversed in part, 101 Wn.2d 349, 678 P.2d 332 (1984). The case turned on Mr. Russell's credibility versus that of Sherry Hanks. There were no other eyewitnesses, and the jury was left to consider "conflicting stories and inconsistent physical evidence." State v. Russell, 101 Wn.2d at 350, 678 P.2d at 334. Mr. Russell has always maintained his innocence of the charges against him.

In his first trial in July of 1980, Mr. Russell was acquitted of the charge of first degree murder. The jury was

unable to reach a unanimous decision, with the split being 7 to 5 for acquittal, on the lesser included offense of second degree murder and on the charges of first degree rape and attempted murder in the first degree. CR 1 below, p. 8.

In August, 1980 Mr. Russell was re-charged, this time with one count of intentional murder in the second degree, one count of attempted murder in the first degree, and one count of rape in the first degree. Later, Mr. Russell was re-arraigned on a second amended information, which contained two alternative second degree murder theories: added to the intentional murder charge was the charge of felony murder, in addition to the other counts of rape in the first degree and attempted murder in the first degree. The second jury trial on this amended information resulted in conviction as to all three counts. State v. Russell, 101 Wn.2d at 350-351, 678 P.2d at 334.

Mr. Russell prosecuted a state appeal. The State Court of Appeals affirmed his conviction in early 1983. State v. Russell, supra, 33 Wn. App. at 592, 657 P.2d at 346. The Washington Supreme Court, however, reversed Mr. Russell's conviction for second degree murder and left intact his other convictions. State v. Russell, supra, 101 Wn.2d at 354, 678 P.2d at 336. The state elected not to retry Mr. Russell on the second degree murder charge which had been reversed, and accordingly he was sentenced in 1984 to his current sentences for rape and attempted murder.

Mr. Russell's counsel did raise the issues now raised in the

federal habeas corpus petition in the Washington Court of Appeals on direct appeal. That court specifically ruled on those issues, but denied relief. State v. Russell, supra, 33 Wn. App. at 588-591, 657 P.2d at 344-346.[1]

Mr. Russell's counsel then filed a Petition For Review in the Washington Supreme Court. Although he did not specifically include in the petition for review the issues now raised in the federal habeas petition, he believed that the filing of the petition for review brought all issues raised in the Court of Appeals before the Supreme Court, and he intended that all such issues be before that court. See counsel's declaration, attached as Exhibit 2 to CR 9, below. Indeed, because of this belief, counsel attempted to argue all issues -- including those underlying the habeas petition in this case -- before the Washington Supreme Court,[2] but was instructed by the court to limit argument to the issues delineated in the Petition For Review. Id. The Washington Supreme Court, pursuant to Washington Rule of Appellate Procedure ("RAP") 13.7(b), determined only the issues specifically identified in the

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[1]/ The claims he raises allege denial of the benefit of the presumption of innocence by the actions of a jail guard in apprehending Mr. Russell in front of the jury when the trial court called him to the bench; denial of due process due to improper prosecutorial argument; and violation of the cross-examination component of the Sixth Amendment's confrontation claus. Habeas petition, CR 1 below.

[2]/ Therefore, the issues were hardly "abandon[ed]" (Petition at 3). No court has ever called the issues abandoned at any stage.

petition for review. State v. Russell, 101 Wn.2d at 350-355, 678 P.2d at 334-336.

Mr. Russell, with the assistance of present counsel, then filed his first petition for writ of habeas corpus in the federal district court, raising the constitutional claims now raised in the present case. The State in the first federal habeas corpus case moved for dismissal of the petition, claiming that Mr. Russell had not presented his claims to the Washington Supreme Court; the State specifically said that:

> Petitioner Russell has an adequate and available remedy in the State courts through the personal restraint petition procedure, Washington Rules of Appellate Procedure (RAP) 16.3 et seq.

Memorandum in Support of Motion to Dismiss, p. 10, in Russell v. Ducharme, No. C86-451R, attached as Exhibit 1 to CR 9 below (emphasis added). Mr. Russell opposed the motion, arguing that his counsel had in fact raised the issues at argument before the Washington Supreme Court. But based on the State's assertions, the Federal District Court dismissed without prejudice his habeas petition so that Mr. Russell could file a Personal Restraint Petition, as the State had suggested. CR 10 below, p. 4.

Mr. Russell next duly filed a Personal Restraint Petition in the Washington Supreme Court asking that court to consider his federal constitutional claims, as the State asserted in federal court he could do. Ex. 3 to CR 9. Next the State, now taking the opposite position, filed its response in the Washington Supreme Court claiming that Mr. Russell could not seek relief by

way of such a petition. Response To Personal Restraint Petition, quoted in Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). The Washington Supreme Court transferred the case to Division I of the Washington Court of Appeals.[3] The Chief Judge of that court stated in a summary order that because the issues had been previously adjudicated in Mr. Russell's direct appeal, they would not be heard again in the Court of Appeals. Appendix D to the Petition herein.

Mr. Russell then filed a Motion For Discretionary Review in the Washington Supreme Court. This Motion is attached as an Exhibit to CR 7 below. Mr. Russell argued that the State was estopped from asserting that he did not have a remedy, given that the State had represented to the federal court that a remedy was available to him to have his issues addressed by the Washington Supreme Court. Alternatively, Mr. Russell argued that in any event his issues should be heard on the merits, for both equitable and legal reasons.

The Washington Supreme Court responded as follows. In a three page, detailed ruling, the Commissioner of that court denied plenary review, but stated, among other things:

> Further, the Court of Appeals' treatment in Mr. Russell's appeal of each of his three renewed legal issues still appears to be fully consistent with applicable case law. See State v. Russell, supra, 33 Wn. App. at 587-589. The more recent cases Mr. Russell

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[3]/ The Washington Supreme Court has concurrent original jurisdiction over personal restraint petitions along with the Washington Court of Appeals. Washington Rule Of Appellate Procedure "RAP" 6.3(c).

cites do not change the governing rules of law.

Ruling Denying Discretionary Review, p. E-3 to the Petition herein (emphasis added). The Commissioner's Order also found correct the Court of Appeals' dismissal of Mr. Russell's Personal Restraint Petition because the issues had previously been litigated in that court. Ibid. The Commissioner concluded:

> In sum, Mr. Russell has not shown that the Acting Chief Judge [of the Court of Appeals] erred by dismissing his personal restraint petition or that review is otherwise merited...

Id. at E-3 (emphasis added). Mr. Russell then addressed to a panel of five justices of the Washington Supreme Court a Motion To Modify Commissioner's Ruling.[4] That motion was considered by the justices and denied. Appendix A hereto.

Mr. Russell next filed a second petition for writ of habeas corpus in the District Court. Now the State moved for summary judgment, this time claiming that Mr. Russell was procedurally barred from litigating his constitutional claims in federal court unless he showed "cause and prejudice" for his alleged procedural default. CR 6 below. Mr. Russell, now acting pro se, responded, inter alia, that the Washington Supreme Court did in fact consider the merits of his constitutional arguments when it found the Court of Appeals' rejection of those arguments "in Mr. Russell's appeal" to be "consistent with applicable case law"; that in any event there was no state law bar in any sense adequate to prevent federal review; and that his attorney's

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[4]/ See discussion at pp. 13-15, below.

attempts to have the issues heard in the Washington Supreme Court on direct appeal constituted sufficient "cause" to allow his habeas petition to go forward. CR 9.[5]

A United States Magistrate recommended that the District Court find that the Washington Supreme Court had reviewed Mr. Russell's federal constitutional claims on the merits in his personal restraint proceeding, and therefore that the federal habeas petition be heard on the merits. CR 10 below. The District Court disagreed, and dismissed the petition for failure to demonstrate "cause and prejudice". Appendix C to the Petition.

Mr. Russell, now acting through counsel, then appealed to the United States Court Of Appeals. In an opinion written by Judge Trott, a majority of the panel held that the detailed written decision of the Washington Supreme Court[6] simply failed to contain a statement "clearly and expressly" grounding its decision on a state procedural bar as required by Harris v. Reed, 489 U.S. 255 (1989), and noted there was no applicable state procedural rule barring Mr. Russell from bringing before the Washington Supreme Court in a personal restraint petition claims

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[5]/ Petitioner's claim that as to the estoppel question, "Russell had bandoned [sic] it by failing to present it" in federal court (Petition at 5, n.8) is incorrect. Mr. Russell specifically argued estoppel in his opposition to the State's summary judgment motion in federal district court. CR 9 at 2-3.

[6]/ The Petitioner premises much of its argument on trying to suggest that this ruling was not a decision or judgment of the Washington Supreme Court. However, as is shown at pp. 13-17, below, this premise is incorrect.

that had been previously brought in the Washington Court Of Appeals on direct appeal. Russell v. Rolfs, 893 F.2d at 1035-1037. As a completely alternative holding, the Court Of Appeals found that the State had taken directly contrary positions in federal and then state court regarding the availability of a personal restraint petition to bring Mr. Russell's federal constitutional claims before the Washington Supreme Court, and said that even if the State's claim of procedural bar had not failed the relevant federal requirements, the State would be estopped from preventing a hearing on the merits. Id., 893 F.2d at 1037-1039.[7]

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE WAS NO STATE PROCEDURAL BAR APPLICABLE TO THE PRESENT CASE, AND SO THE ISSUES LISTED IN THE PETITION ARE NOT PRESENTED HERE.

The State repeatedly suggests that the State courts applied an adequate and independent state procedural ground which should bar federal review of the merits of Mr. Russell's constitutional claims. E.g., Petition at 4, 12, 13. The State assumes far too much. State law threw up no such bar in this case.

In order to claim a state procedural default, the State must show that there was a clear, firmly established state procedural rule that held that if a claim or objection was not raised by a specific stage, it could not be raised later. James v. Kentucky

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[7]/ The Court Of Appeals did not fully reach Mr. Russell's arguments that, in any event, the State's proposed procedural bar did not qualify as an "adequate state ground" to prevent federal review on the merits. See pp. 11-13 of this Brief, below.

466 U.S. 341, 348-349 (1984); Ulster County Court v. Allen, 442 U.S. 140, 150 (1979). See, for example, the rules referenced in Hankerson v. North Carolina, 432 U.S. 233, 244 f.n. 8 (1977) and Engle v. Issac, 456 U.S. 107, 115 f.n. 15 (1982).

The State's attorney alleged in the court below that Mr. Russell committed a state procedural default when his counsel failed to include in his Petition For Review on direct appeal to the Washington Supreme Court the habeas claims he now raises in federal court:

> The default occurred in 1983 when [Mr. Russell] filed his Motion For Discretionary Review [actually Petition For Review] which did not include his present claims.

Brief of Respondent-Appellee below, p. 12. However, although it is true that the claims now at issue were not in that Petition For Review and arguably not then passed upon by the Washington Supreme Court, it is not true that this amounted to a state procedural default precluding a later review in the Washington Supreme Court. Washington law at the relevant time explicitly eschewed such a bar. In In re Lee, 95 Wash. 2d 357, 623 P.2d 687 (1980), overruled on other grounds, In re Hews, 99 Wash. 2d 80, 660 P.2d 263 (1983), the Washington Supreme Court held that where an issue had been raised on direct appeal but not included in a request for review in the Washington Supreme Court -- as one petitioner (Malone) in Lee had done -- it could be later raised and heard on the merits in a personal restraint petition. 623 P.2d at 692. Thus, there is no cognizable procedural bar here.

The State proposes that the alleged procedural bar is the

Washington Court Of Appeals' determination that under In re Taylor, 105 Wn.2d 683, 717 P.2d 755, 757 (1986), it would not rehear the same issues in a personal restraint petition. Petition herein at 9. However, even apart from the fact that this Washington Court Of Appeals order is not even the relevant decision for purposes of applying federal law (see §II below), the Taylor rule could not bar federal review in this case, for several reasons.

First, Taylor does not establish any strictly followed procedural waiver rule: "[W]e hold the mere fact that an issue was raised on appeal does not automatically bar review in a PRP." Taylor, 717 P.2d at 758 (emphasis added). This is not a procedural bar rule, i.e. a rule that holds that a failure to raise an issue at a particular time "is a waiver of any claim of error". Hankerson, 432 U.S. at 244 f.n. 8. Instead, application of Taylor is so bound up with review of the merits of claims that the Taylor rule can in no sense be seen as a procedural bar applied "independent" of the federal constitutional merits. See Ake v. Oklahoma, 470 U.S. 68, 75 (1985).[8] Indeed, a Taylor ruling such as the one in the present case by the Washington Court Of Appeals indicates that the merits have been fully reached once and then reviewed a second time. Appendix D to the Petition herein. This is not an adequate state procedural

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[8]/ The determination under Taylor of whether a petitioner may relitigate an issue requires inquiry into the merits. 717 P.2d at 757-758.

ground.

Second, the Taylor rule did not exist at the time Mr. Russell allegedly defaulted, i.e. on the filing of his Petition For Review in the Washington Supreme Court on direct review in 1983. Taylor was decided in 1986. At the time of Mr. Russell's direct appeal, the discernible law in Washington was that constitutional issues could be raised at any time in a personal restraint petition. In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982); In re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983). Moreover, even before Hagler and Hews made that clear, it was plainly the law that issues that had been litigated on direct appeal but left out of a request for review in the Washington Supreme Court could be resurrected in a personal restraint petition. In re Lee, supra.[9]

New state rules cannot be applied retroactively to try to prevent federal review of constitutional claims. Ford v. Georgia, ____ U.S. ____, 111 S.Ct. 850, 857 (1991), citing James v. Kentucky, 466 U.S. at 348-351, and other cases. Application of Taylor to Mr. Russell's actions in 1983 therefore could not

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[9]/ The dissent below asserts that the treatment of petitioner Malone in In re Lee was an application of the Taylor rule in that Lee involved retroactive application of a change in the law. 893 F.2d at 1041. But Lee could hardly have applied Taylor because Lee was decided six years before Taylor. Moreover, as Lee itself makes clear, there was no new law at stake to be applied retroactively. 623 P.2d at 690. Rather, the Washington Supreme Court found that the law extant at the time Malone prosecuted his direct appeal should have provided relief for him then. Id. at 691. Thus, he was clearly allowed to relitigate his same claim.

prevent federal review.

This case therefore presents nothing like the issues put forth in the Petition. There was no cognizable state procedural default or clear procedural bar rule that operated to bar Mr. Russell from raising his claims in federal court.[10] The petition should be denied.

II. THE COURT OF APPEALS WAS FULLY JUSTIFIED, INDEED OBLIGED UNDER HARRIS V. REED, IN REVIEWING FOR A "PLAIN STATEMENT" OF STATE GROUNDS THE THREE-PAGE DECISION OF THE WASHINGTON SUPREME COURT RATHER THAN THE ONE-PAGE ORDER OF A SINGLE WASHINGTON COURT OF APPEALS JUDGE.

As is shown above, the State premises its arguments on the incorrect assertion that there was a state procedural bar. The State further premises its argument that the Court Of Appeals misapplied Harris v. Reed on a claim that the Washington Supreme Court did not render judgment on Mr. Russell's State post-conviction petition. Petition at 8-11. As is shown here, this premise is also wrong.

As the State concedes, after the Acting Chief Judge of the Washington Court Of Appeals dismissed Mr. Russell's personal restraint petition in a brief order (Petition Appendix D), Mr. Russell filed in the Washington Supreme Court a Motion for Discretionary Review of that decision. This motion resulted in a written 3-page Commissioner's Ruling Denying Review. Appendix E

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[10]/ Even if there were such a rule, it nevertheless could not meet the other federal standards of adequacy as a state ground preventing federal review, as it lacks clear enunciation and consistent application. See e.g., James v. Kentucky, 466 U.S. 341 (1984).

to the Petition. As the State fails to mention, Mr. Russell then moved under Washington Rule Of Appellate Procedure ("RAP") 17.7 for a five-member panel of the Washington Supreme Court to modify and reverse the Commissioner's Ruling.[11] By order signed by the Chief Justice, those five justices declined to modify the Commissioner's decision. Appendix A hereto.

Contrary to the State's assertions, these actions did make the Washington Supreme Court "the last state court rendering a judgment." Harris v. Reed, 489 U.S. at 263. Washington RAP 1.1(f) provides that the action of a commissioner is an action of the court:

> **Action of Appellate Court.** The appellate court clerk and commissioner are given authority by these rules to make some decisions, called rulings. An act performed on the authority of these rules is action taken by the appellate court whether that act is performed by the clerk or a commissioner or by the judges of the Supreme Court or the Court of Appeals.

Moreover, in this case a panel of five Washington Supreme Court justices were asked to overturn this ruling,[12] but on consideration determined not to change it. Obviously the

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[11]/ Washington RAP 17.7 provides in relevant part:

> **OBJECTIONS TO RULING - REVIEW OF DECISION ON MOTION.** An aggrieved person may object to a ruling of a commissioner or clerk... [only by a motion to] modify the ruling directed to the judges of the court served by the commissioner or clerk... A motion to the justices in the Supreme Court will be decided by a panel of five justices unless the court directs a hearing by the court en banc. [Emphasis added.]

[12]/ See Washington RAP 17.7, quoted in footnote 11, above.

Washington Supreme Court rendered a detailed decision, with reasons stated, on Mr. Russell's efforts to gain post-conviction relief in state court.[13] Indeed, in another section of its Petition, the State in essence concedes this by stating "In his ruling denying discretionary review, the Supreme Court Commissioner... held that the state was not estopped..." Petition at 13, n.16 (emphasis added).

Thus, the State absurdly proposes that a one-page summary ruling by a single Judge of the Washington Court Of Appeals should be taken as the judgment of the last state court to rule, but the detailed three-page statement of reasons issued by a commissioner and approved by five justices of the Washington Supreme Court should be ignored. Obviously, the Washington Supreme Court's decision was the proper one for scrutiny under Harris v. Reed, and this case fails to present the issues the State attempts to advance.[14]

For similar reasons, there exists no split among circuit

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[13]/ Judge Trott, in his opinion in the Court of Appeals called the commissioner's ruling a "report". 893 F.2d at 1035. And indeed such a ruling does serve a function very similar to a U.S. Magistrate's "Report And Recommendation". See 28 U.S.C. §636. Just like such a Report and Recommendation, the Commissioner's ruling, if adopted or left unchanged by the justices, clearly becomes the statement of reasons underlying the court's judgment.

[14]/ The State's focus on the Washington Court Of Appeals' ruling is also misleading because the exhaustion issue in the first federal habeas case was whether Mr. Russell had properly presented his claims to the Washington Supreme Court. All parties agreed he had presented them to the Washington Court Of Appeals, which is why he filed his personal restraint petition in the Washington Supreme Court.

decisions as Petitioner contends. All of the cases Petitioner cites to try to manufacture such a split deal with "silent" denials of review by a state's highest court; as the State itself says, the issues in those cases involve "a state supreme court's unexplained denial of certiorari to review..." Petition at 8 (emphasis added). None of the cases cited deal with the situation presented here, where the state supreme court provided a detailed statement of reasons for decision. As explained in one of the cases cited by Petitioner, under Harris federal courts should at least look to "the opinion given by the highest state court that has supplied an explanation." Prihoda v. McCaughtry, 910 F.2d 1379, 1383 (7th Cir. 1990) (emphasis added). In this case, that was obviously the Washington Supreme Court, in its detailed statement of reasons. See also the other cases cited by the State: Harmon v. Barton, 894 F.2d 1268, 1273 (11th Cir.) cert. denied, 111 S.Ct. 96 (1990) ("affirmance without comment" is at issue); Felton v. Barnett, 912 F.2d 92, 94 (4th Cir. 1990) (denial without explanation in state supreme court); Goodwin v. Collins, 910 F.2d 185, 186 (5th Cir. 1990) (denial by Texas Court Of Criminal Appeals "without written opinion"). Unlike those cases, here the federal Court Of Appeals was not left "to speculate on what basis the state court denied petitioner's claim" (Harmon, 894 F.2d at 1273); rather, there was a three-page

statement of reasons from the Washington Supreme Court.[15]

All the Court Of Appeals did in this case was follow Harris v. Reed to the letter. The Court Of Appeals looked at a detailed statement of reasons for denial of relief supplied by the Washington Supreme Court, found that it was ambiguous and lacked a "plain statement" of procedural default as the basis of its ruling, and therefore found no "adequate state ground" precluding federal review, all as commanded by Harris, 489 U.S. at 260-263. Acceptance of such a case for review by this Court would accomplish exactly what the decision in Harris sought to avoid: The involvement of this Court in reviewing every lower court application of Harris that results in rejection of the State's procedural bar argument. This case involves nothing more than the State's request for such a review of a federal court's straightforward application of Harris, and the petition for certiorari should therefore be denied.

III. THE COURT OF APPEALS' ESTOPPEL RULING IS FACT-BOUND AND UNIQUE TO THIS CASE AND THEREFORE INAPPROPRIATE FOR RESOLUTION IN THIS COURT.

The estoppel decision in the Court Of Appeals was a wholly alternate ground for decision, based on the unique facts of this case. The State specifically stated in the first federal habeas case not just that State remedies had not been exhausted (even

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[15]/ Consequently, this case is also totally unlike a case now before this Court, Ylst v. Nunnemaker, No. 90-68. In Ylst, the issues involve the meaning under Harris of a state supreme court's denial "without comment" of a post-conviction petition. Ylst Cert. Petition at 11-12.

though Mr. Russell's counsel had tried to present and argue all of his claims to the Washington Supreme Court), but also specifically said that there was an adequate and available remedy by way of personal restraint petition to bring his claims before the appropriate court to accomplish exhaustion, the Washington Supreme Court.[16] Then as soon as Mr. Russell filed precisely the form of petition in the Washington Supreme Court that the State had called "available" in its federal pleadings, the State specifically argued in the Washington Supreme Court that this remedy was not available. Next the State argued on the second habeas petition that Mr. Russell had been procedurally defaulted in state court.

The Petition conveniently fails to mention crucial parts of this factual context, i.e. the State's active switch in position from federal to state court. The Court Of Appeals did not hold that as a general matter, "[w]hen the state fulfills its statutory obligation to advise the court that a federal habeas petitioner has failed to exhaust state remedies... the state [is] precluded from asserting a procedural bar defense in response to a second petition..." (Petition at i, statement of question 2). Rather the Court Of Appeals simply invoked equitable doctrines that are inherently case-by-case in nature and found that because here the State had gone beyond merely saying that State remedies had not been exhausted, but had also said what specific state

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[16]/ The Washington Court Of Appeals had already heard the claims.

remedy was "adequate and available" and then specifically argued in state court that that exact remedy was not available, the State could not assert a procedural bar defense to the second federal habeas petition.

This was an unremarkable decision. Habeas defenses -- even statutory ones -- can be waived by specific state conduct in a given case. Granberry v. Greer, 481 U.S. 129, 134-135 (1987) (courts of appeals can decide on case-by-case basis whether nonexhaustion defense has been or may be waived). See also Davis v. Wakelee, 156 U.S. 680, 689 (1895):

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

The Court Of Appeals held that on the unique facts of this case such a waiver by conduct had occurred.

The State is not put in the difficult position it claims by Judge Trott's opinion. Attorneys for the State do not have as their primary function winning cases; rather, they are to seek substantial justice. See Berger v. United States, 295 U.S. 78, 88 (1935); ABA Standards for Criminal Justice, 3-1.1(c) (2d Ed. 1980). Although statutorily required to advise the federal court of possible exhaustion problems, state attorneys are not foreclosed from waiving defenses in the interests of justice or other important values. Granberry. Most importantly, no state attorney ever risks waiver of a procedural default defense unless

he or she diametrically changes positions between courts, "and the upshot is to whipsaw the petitioner back and forth between two court systems." Russell v. Rolfs, 893 F.2d at 1038. This specific set of facts is highly unlikely to recur.[17]

Obviously, then, the Court Of Appeals' holding was not, as the State suggests, that the State can never claim nonexhaustion in a first habeas petition and procedural bar in a second. Rather, Judge Trott's opinion is totally based on a set of circumstances highly unlikely to recur, in which the State actively sought advantages from federal court to state court to federal based on diametric changes in position. This fact-bound ruling would not merit a grant of certiorari in any case. In the present case, given the serious defects in the adequacy of the state grounds the state asserts, and the Court Of Appeals' straightforward Harris holding which completely supports its decision, there is even less reason for this Court to grant the writ. The petition should be denied.

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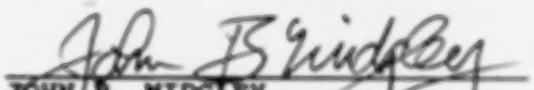
[17]/ The State also suggests that the Court Of Appeals majority is not cognizant of the differences between, and the importance of, the exhaustion doctrine and procedural bar jurisprudence. Petition at 12, 14. However, Judge Trott, the author of the majority opinion, is well acquainted with the doctrines at issue. See his analysis barring a claim in Tacho v. Martinez, 862 F.2d 1376, 1378-1380 (9th Cir. 1988). Clearly the decision in this case is based on the special facts presented here, not on any lack of enthusiasm for procedural bar doctrine.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED: March 29, 1991.

Respectfully submitted,



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APPENDIX A

THE SUPREME COURT OF WASHINGTON

NO. 53910-3
COURT OF APPEALS NO. 20075-5-I

In the Matter of the Personal Restraint Petition of: LOUIS EUGENE RUSSELL, Petitioner.	)	ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

This matter came on before the Court on its October 6, 1987, Motion Calendar on Petitioner's Motion to Modify Commissioner's Ruling. The Court having considered the Motion and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 6th day of October, 1987.

VERNON R. PEARSON
Chief Justice

NO. 90-1370

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TOM ROLFS, Superintendent, Petitioner, v. LOUIS EUGENE RUSSELL, Respondent.	AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
: ss.
County of Thurston)

I, John B. Midgley, a member of the Bar of this Court, hereby certify that on the 29th day of March, 1991, I mailed, first class postage prepaid, one copy of Respondent's Brief In Opposition and one copy of Respondent's Motion To Proceed In Forma Pauperis, to:

John M. Jones
Assistant Attorney General
Corrections Division
Mail Stop PZ-11
Olympia, WA 98504

I further certify that all parties required to be served have been served.

John B. Midgley

JOHN B. MIDGLEY
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Institutional Legal
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SUBSCRIBED AND SWORN TO before me this 29th day of March, 1991.

Shirley A. Gregor

NOTARY PUBLIC in and for the State of Washington, residing at: Seattle.
My commission expires: May 25, 1991